Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THOMAS F. WERNER, RUTH E. WERNER, DAVID LITWACK, YVETTE A. LITWACK, WILLIAM WARGO, LYNN WARGO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether federal courts should ignore state real property law in favor of federal common law to determine real property claims pursuant to Title 28, Section 2909(a), the Federal Quiet Title Act.

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OPINIONS BELOW

This Petition seeks review of an unreported opinion of the District Court for the Northern District of Florida, dated December 16, 1994 (Appendix, p. 16a). The opinion held that "Federal Common Law" of real property, not Florida state law is to be used in determining whether Petitioner is entitled to an easement of necessity across federal lands under the Federal Quiet Title Act. The Court of Appeals order affirming the District Court is dated September 26, 1995, and is likewise unreported (Appendix p. 1a).

STATEMENT OF JURISDICTION

This Petition seeks review of the judgment of the District Court for the Northern District of Florida, dated December 16, 1994, adverse to the Petitioner. That judgment was affirmed by the Eleventh Circuit Court of Appeals on September 26, 1995. Petitioner seeks to evoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), and pursuant to Supreme Court Rule 10(a). Petitioner asserts here that the opinion of the District Court, as affirmed by the opinion of the Eleventh Circuit, conflicts on the important federal question which this case presents with the decision of the Ninth Circuit Court of Appeals in *Schultz v. Department of the Army, United States of America*, 10 F.3d 649 (1993).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2409(a), the Federal Quiet Title Act.

STATEMENT OF THE CASE

Petitioners sought in the District Court the declaration of an easement of necessity across Air Force property to gain

access to Petitioners' property. The circumstances that create need of the easement are that Petitioners own a waterfront peninsula of land which is isolated from access to a public road by a recreation park operated in Okaloosa County, Florida, by the Air Force. The only land access to Petitioners property is across the Air Force's recreation camp.

Petitioners filed this suit to gain documented access pursuant to the United States Quiet Title Act, 28 U.S.C. § 2409(a), [hereafter the "Federal Quiet Title Act"]. Petitioners sought their easement pursuant to Florida Statute 704.01(2). (The facts of the case are further set forth, acceptably to Petitioners, in the trial court's opinion dated December 16, 1994.)

The trial court concluded, for purposes of its opinion, that the Federal Quiet Title Act could be used to impress an easement on behalf of a private claimant against the Federal Government. *See, e.g., Montana Wilderness Association v. United States*, 496 F. Supp. 880 (D.M. 1980), *aff'd in part*, 555 F.2d 951 (9th Cir. 1981); *Burdess v. United States*, 553 F. Supp. 646 (E.D. Arkansas 1982); *Vincent Murphy Chevrolet Company, Inc. v. United States*, 766 F.2d 449 (10th Cir. 1985).

The trial court, however, ruled that for purposes of the Federal Quiet Title Act, the elements of an easement of necessity are not to be determined by the law of the State of Florida, but must be limited to those circumstances in which the common law of real property would award such an easement.

An easement of necessity in Florida is awarded in two circumstances, primarily. The first is described in Florida Statute 704.01(1), and is a codification of common law. It requires a showing of necessity, and severance of the

dominant and serviant parcels at a time when the parcels were under common ownership. The second circumstance, described in Florida Statute 704.01(2), is an easement of necessity created by statute. It requires no unity of title. The full text of the statute is as follows:

> (1) IMPLIED GRANT OF WAY OF NECESSITY.
>
> The common-law rule of an implied grant of a way of necessity is hereby recognized, specifically adopted, and clarified. Such an implied grant exists where a person has heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over his land, or has heretofore retained or hereafter retains land which is inaccessible except over the land which he conveys. In such instances a right-of-way is presumed to have been granted or reserved. Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonable necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state of United States; provided, however, that where there is a common source of title subsequent to the original grant from the state or United States, the right of the dominant or servient tenement has been or should be transferred for

nonpayment of taxes either by foreclosure, reversion, or otherwise.

(2) STATUTORY WAY OF NECESSITY EXCLUSIVE OF COMMON-LAW RIGHT.

Based on public policy, convenience and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed-in by lands, fencing or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock franchised cable television service, and any utility service, including but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid,

> shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided that such easement shall be used only in an orderly and proper manner.

Florida Statute 704.01(2), the "Statutory easement of necessity", acknowledges special circumstances which exist in Florida because of the rapid growth of the state, and because of a legislative public policy to discourage isolated pockets of property which cannot be developed. *See Deseret Ranches of Florida, Inc. v. Bowman*, 349 So. 2d 155 (Fla. 1977).

Petitioners rely in this action upon Florida's Statutory Way of Necessity (§ 704.01(2)), since there was never unity of title, and Petitioners qualify in all other ways for grant of such easement. The trial court determined that the Federal Quiet Title Act is a waiver of sovereign immunity, and that as such it must be strictly construed. In addition, the trial court reasoned that Congress must have intended consistency across the states, and therefore a federal common law should be applied. Common law requires unity of title. Here the Petitioners had no unity of title, and the trial court determined Petitioners to be unentitled to award of a statutory easement of necessity across federal land where there was never unity of title.

REASONS FOR GRANTING THE WRIT

In its limitation of the Federal Quiet Title Act to a federal common law of easements, the courts below departed from the prior opinion of several other District Courts and at least the Ninth Circuit Court of Appeals. In addition, the lower courts' treatment creates a contradiction with the legislative history of the Federal Quiet Title Act.

In *Schultz v. United States Department of the Army,* 10 F.3d 649 (9th Cir. 1993) the Ninth Circuit was confronted with a claimant, *Schultz*, who owned property to the Northeast of Fort Wainwright and east of Fairbanks, Alaska. To get to Fairbanks, *Schultz* was required to cross Fort Wainwright. The base was situated on land owned by the Federal Government. The Court made factual findings that travel in and around Fort Wainwright was difficult, and that in Alaska, more than most other locations, the season dictates the nature and means of passage. The trial of the action involved introduction of evidence of various historical routes across the land now occupied by the U.S. Army. The court found that in 1981 the Army instituted a pass system for vehicles entering or crossing the base and that when *Schultz* did not present a pass, the Army refused him entry. The court found that no other land route was available, and without access through Fort Wainwright *Schultz* was landlocked. The court stated that "hemmed in by Fort Wainwright to the East and the Chena River to the South, the property cannot be developed or subdivided." The Army had taken the property in a series of transactions beginning in 1937. All of the acquisitions were made "subject to valid existing rights." Petitioner filed its suit under the Federal Quiet Title Act, claiming to be entitled to declaration of an easement on two separate theories. The first had to do with a public road right-of-way which existed pursuant to 43 U.S.C. § 932 before the statute was repealed in 1976, which rights of way were known as RS 2477 right-of-way. The second alternative upon which *Schultz* claimed his easement of necessity was under Alaska law as a "public easement" by prescription".

As to the first issue, the court found that whether an RS 2477 right-of-way existed prior to the time the Army took title beginning in 1937, was a question entirely of state law. *Schultz* at page 655. The Circuit Court did not deal clearly with

the first issue, except to say that whether or not a public road exists is a matter of Alaska law. The court did deal with the second, whether or not an easement existed pursuant to Alaska law. The court said specifically that:

> Under Alaska law "public easements may be acquired by prescription." *Dillingham*, 705 P. 2d at 416 (citing 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980)). "To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner." *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) (citing *Swift v. Kniffen*, 706 P.2d 296, 302 (Alaska 1985)). "[A] claimant must show essentially the same elements as for adverse possession." *Swift*, 706 P.2d at 302. He must overcome the presumption that "[w]hen [he] enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title." *Hamerly*, 395 P.2d at 129; *see also McGill*, 839 P.2d at 397. "Use alone for the statutory period" is insufficient. *Hamerly*, 395 P.2d at 129. "The use must be open notorious, adverse, hostile, and continuous." *Dillingham*, 705 P.2d at 416. The purpose of these requirements is "to put the record owner on notice of the existence of an adverse

> claimant." *Swift*, 706 P.2d at 302. In some cases, a private permissive easement may become prescriptive if it "was for many years the only means of passage [through] the dominant estate." *McGill*, 839 P.2d at 398. The fact that the easement is shared does not defeat the claim because "[i]t would not be expected that an easement holder would object to traffic on or use of that part of a roadway which did not interfere with its [sic] [the easement holder's] use."

Id.

The Ninth Circuit Court of Appeals affirmed the District Court's award of an easement across federal land by reference to Alaska substantive law.

The United States District Court for the Eastern District of Arkansas used a similar rationale in the case of *Burdess v. United States Army Corps of Engineers*, 553 F. Supp. 646 (1982). In that case the claimant, *Burdess*, was separated from portions of his property by land owned by the Corps of Engineers. The court wrestled with the applicability of the Federal Quiet Title Act, and decided that "the case law and legislative history clearly support the proposition that a claim for a right-of-way, easement, implied easement of necessity or other estate less then a fee simple may properly be the subject of Quiet Title Action against the United States. *City of Denver v. Bergland*, 517 F. Supp. 155 (D. Col. 1981)" The court concluded that it did have jurisdiction to consider the claim under the Federal Quiet Title Act. The court concluded that the Plaintiff was entitled to an easement. In reaching that conclusion the court, at pages 649 and 650 expressly relied

upon the theory of common law easements of necessity. The court said that:

> The state of Arkansas adopts this common law approach. *See Brandon Berg v. Brooks,* 264 Ark. 939, 576 S.W. 2d 196 (1979). In the *Brandon Berg* case the Arkansas Supreme Court also addressed the issue of the degree of necessity required before a way of necessity could be implied. The court held that absolute necessity was not required, but that "a way of necessity must be more than one of mere convenience." *Id.* 940, 576 S.W. 2d at 196. As opposed to an easement by necessity, which theoretically allows for a route of access where one previously did not exist, an easement by implication rests on the theory that a route of access was in existence at the time of the severance of a single parcel of land. The precise elements to be proved by the Plaintiff were set out in *United States v. Thompson,* 372 F. Supp. 774, 784-785 (E.D. Ark. 1967), *aff'd,* 408 F. 2d 1075 (1969) (adopting the Arkansas rule as set out in *Greasy Slough Outing Club v. Amick,* 224 Ark.330, 274 S.W. 2d 63 (1954)).

The District Court in Arkansas used Arkansas law, which was not required to be, and presumably was not, the same as the law in other states to define the extent and existence of an easement of way. Similarly, the Circuit Court in *Schultz v. United States Department of the Army, supra,* did exactly the same thing in Alaska.

The legislative history of the Federal Quiet Title Act provides some help in determining the intent of Congress:

> The main objection in the past to waiving sovereign immunity in this area has been that it would make possible decrees ousting the Untied States from possession and thus interfering with operations of the Government which have been authorized by the Congress. Our draft bill would eliminate cause for such apprehension. The provision subsection (b) of proposed section 2409a would apply where the Untied States is in possession and the court finds that it is occupying the property without title. If the United States wished to retain possession it would be required to so elect and to pay compensation as determined by the court to the true owner. If the United States were in possession under a lease, and the title of the Government's lessor were adjudicated to be invalid, the United States could elect to continue its lease with the true owner. If the United States were adjudged to be occupying without title, it is only fair to require it to choose between acquiring the right to possession and ceasing to occupy. The procedure so provided preserves the Tucker Act method for acquisition of property by the Government, as it preserves the concomitant right of the former owner to receive just compensation. A difference from the remedy provided by 28 U.S.C. 1346(a)(2),

however, is that the district courts would have jurisdiction without regard to any jurisdictional amount. *Where the subject matter of the litigation is real property, it appears equitable that suit be authorized in a court near the situs of the property.*

One approach to a statute waiving immunity in this area would have been to adopt state law in its entirety, thereby placing the United States on the same footing as any private litigant. However, the wide differences in State statutory and decisional law on this subject make this an impractical alternative. Along with the merger of law and equity, many States have enacted legislation to abolish some of the traditional prerequisites for the institution of suits to quiet title. The requirement of possession has occasionally been dropped (see Cal. CCP sec. 738; Neb. R.R.S. 1943 § 25-21, 112: and Code Va § 55-153), and the statutory procedure in some States appears virtually to supersede the common law (see Vernon's Ann. Cuv. St. Art. 7364, *et seq.* and 47 Tex Jur. 2d Quieting Title § 1). Several States allow the plaintiff to obtain a judicial determination of rights acquired by adverse possession in this type of suit, and there is an immense variation with respect to the period of limitation on bringing suits. It is our belief that uniformity *at least as to the plaintiff's qualifications* for instituting suit is desirable, and *the draft bill sets forth such qualifications*. Possession in the plaintiff is

> not required. *The State law of real property would of course apply to* decide all questions not covered by Federal law.

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4555. (Emphasis added).

It is clear from the commentary that uniformity as the Plaintiff's qualification for instituting suit was desired by the Congress, and therefore was specifically provided in the draft bill. The matter of uniformity was considered, and presumably to the extent considered necessary, is expressly contained in the act itself. Congress was specifically told that "the federal law of real property would of course apply to decide all questions not covered by federal law." There is no federal substantive law provided in the act. The kinds of actions authorized by the Federal Quiet Title Act include challenge to fee simply title, boundary line disputes, easement disputes, and other real property challenges. If the rule adopted by the Circuit Court in the Northern District of Florida in this case is to apply, District and Circuit Courts across the United States will be required to create federal common law principles of real estate.

The approach taken by the Northern District in Florida would permit the United States, when it acts as plaintiff, to apply law of the forum. When it acts as defendant, federal common law would apply, not forum law. There is no rationale by which the United States is in need of consistency only when it occupies the role of defendant. If consistency of real property principles were truly desired by Congress, those principles should be set forth by statutory law, or otherwise should be adopted by reference. There is no evidence by which a court should presume Congress to have intended consistency

where legislative history indicates that to the extent consistency was considered necessary, provision for that was expressly made.

CONCLUSION

The Ninth Circuit Court of Appeals has made specific reliance upon Alaska law in granting an easement to a landlocked claimant in Alaska. The Circuit Court in the Eleventh Circuit has affirmed the decision of the District Court in Florida which specifically declined to apply Florida law to a landlocked claimant in Florida. This conflict is on a point of law which is critically important to those who claim rights under the Federal Quiet Title Act, across the entire United States. This Court should exercise its certioriari jurisdiction to resolve this conflict between Circuits.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 26, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2202
Non-Argument Calendar

D. C. Docket No. 91-30072-RV

THOMAS F. WERNER, RUTH E. WERNER, DAVID LITWACK, YVETTE A. LYTWACK, WILLIAM WARGO, LYNN WARGO,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

(September 26, 1995)

Before BIRCH and BLACK, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

In March 1991, Thomas Werner, Ruth Werner, David

Appendix A

Litwack, Yvette Litwack, William Wargo and Lynn Wargo (collectively, "Appellants") brought suit against the United States ("Appellee") pursuant to the Quiet Title Act, 28 U.S.C.A. §2409(a) (West 1994), seeking an easement by necessity over federally owned land. In August 1992, the district court granted Appellee's original motion for summary judgment. In December 1993, this Court reversed the district court's grant of summary judgment and remanded the case. *Werner v. United States*, 9 F.3d 1514 (11th Cir. 1993).

In May 1994, Appellee filed a renewed motion for summary judgment on grounds that had been raised in its original motion, but which the district court had not reached. In December 1994, the district court granted summary judgment for Appellee. Appellants contend the district court erred in granting Appellee's renewed summary judgment motion, asserting (1) that an easement of necessity can be claimed against the United States under the Quiet Title Act, (2) that a state retains jurisdiction over federal lands within its territory, and applies state law where it does not conflict with federal law, and (3) that military property is not exempt from the operation of the Quiet Title Act. After a careful review of the record, we conclude that Appellants' contentions have no merit.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 28, 1993

United States Court of Appeals,
Eleventh Circuit.

Dec. 28, 1993

No. 92-3040.

Thomas F. WERNER, Ruth E. Werner, David Litwack, Yvette A. Litwack, William Wargo, Lynn Wargo,

Plaintiffs-Appellants,

v.

UNITED STATES of America,

Defendant-Appellee.

* * *

Appeal from the United States District Court for the Northern District of Florida.

Before ANDERSON and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

Appellants, plaintiffs below, are owners of a small parcel of land located on Choctawhatchee Bay in northern Florida. The property is bounded on three sides by water and on the fourth side

by land that is part of Eglin Air Force Base, a facility of the United States. It is physically impossible to enter plaintiffs' property by land without crossing over the adjoining Eglin land.

On March 15, 1991 plaintiffs sued the United States pursuant to 28 U.S.C. § 2409a(a),[1] the Quiet Title Act, seeking a declaration that they had acquired an easement of necessity pursuant to Florida statute § 704.01(2).[2] The subject matter of the

---

1. § 2409a(a):

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights (with exceptions not relevant).

2. § 704.01(2):

> **Statutory way of necessity exclusive of common-law right.** Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, including, but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through, and upon the lands which lie between

(Cont'd)

claimed easement is an existing road, reaching from the nearest public road, across the Eglin land, and to the boundary of plaintiffs' property. The district court granted the government's motion for summary judgment on the ground that plaintiffs were barred by the 12-year statute of limitations of 28 U.S.C. § 2409a(g), formerly § 2409a(f).[3] We hold that the district court erred in granting summary judgment.

The background.

The United States government has owned the land that is now Eglin Air Force Base since 1821, when Florida and parts of Alabama and Mississippi were acquired from Spain by a treaty of cession. The Eglin land relevant to this case was a part of national forest land transferred from the Agriculture Department to the

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(Cont'd)

> the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided that such easement shall be used only in an orderly and proper manner. As amended by Laws 1991, c. 91-177.

The 1991 Amendments are not relevant to the issues before us.

3. § 2409a(g):

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Appendix B

War Department in 1940 and in that year became part of Eglin Air Force Base.

Plaintiffs trace their title from a deed from one private owner to another dated in 1922. Only private owners appear in their chain of title.

The portion of Eglin across which the plaintiffs seek an easement is known as White Point. White Point Road, the public roadway nearest plaintiffs' property, runs in a general north-south direction within Eglin and ends at Choctawhatchee Bay. White Point Road is approximately one and one-half miles from the western border of plaintiffs' property.

The portion of Eglin lying between White Point Road and plaintiffs' western border is now a recreation area. Prior to its designation as a recreation area in 1956 the site was the location of Eglin housing and contained an access road linking the housing complex to White Point Road. Shortly after the Air Force removed the housing it extended this road approximately three-tenths of a mile to the western border of plaintiffs' property, for the purpose, the government states, of better serving the recreation area and a nearby Navy observation site.

Plaintiffs' tract was purchased by the Werner plaintiffs in 1987. They subdivided the property into three lots, retained one, and sold the other two to the other plaintiffs. As required by § 704.01(2), plaintiffs' property is outside a municipality, and it is not disputed that they desire to use it for dwelling purposes. In September 1987 two of the plaintiffs filed on the county public records a subdivision plot that indicates an existing 20-foot Air Force easement extending from their subdivision westerly across the Eglin land to White Point Road. This alleged easement tracks the location of the access road that serves the recreation area and

reaches plaintiffs' property. In 1980 the government built an electrically-operated gate where the access road reaches plaintiffs property. For a time plaintiffs were provided with cards that unlocked the gate. Later the procedure was changed so that the gate is open from 7:00 a.m. to 10:00 p.m. and then it is locked, leaving plaintiffs unable to reach their property by the access road during the remaining night hours.

Discussion.

Plaintiffs do not claim a common law easement or an implied easement created by Florida statute § 704.01(1). They claim a statutory easement of necessity, created by § 704.01(2). They brought suit pursuant to 28 U.S.C. § 2409a(a), which authorizes suit against the United States in a civil action to adjudicate a disputed title to real property in which the United States claims an interest.[4] An action under § 2409a(a) must be brought within 12 years of the time the action accrued. 28 U.S.C. § 2409a(g).

The government contended, and the district court accepted, that the statute of limitations issue turned upon whether plaintiffs and their predecessors in interest either knew or should have known for more than 12 years before filing suit that the government claimed some interest in or ownership of the Eglin property. From the facts we have set out it was obvious that plaintiffs and their predecessors in title knew or should have known of government ownership or interest for more than 12 years, so summary judgment was granted. But the position of the government, adopted by the district court, misperceives the issue. Plaintiffs do not dispute the government's ownership, nor do they

4. In this appeal the government does not contend that suit may not be brought under § 2409a(a) to adjudicate a claim of the existence of a statutory easement of necessity created by Florida statute § 704.01(2).

deny that they knew the government was owner of the land between their property and White Point Road. Rather they look to the nature or extent of the government's interest and describe it not as unqualified ownership but as ownership limited or qualified by permissive use of the roadway by others. The limitations issue then turns upon whether, prior to the erection of the gate, plaintiffs or others had been permitted to utilize the road for access to plaintiffs' property and, if plaintiffs or others had been so permitted, when did plaintiffs know, or should have known, that the government had changed its position and, adversely to the interests of plaintiffs, denied or limited the use of the roadway for access to plaintiffs' property.[5] Pretermitting questions of who actually used the roadway as access to plaintiffs' property, and the extent of use, it is clear that ingress or egress from plaintiffs' property to White Point Road was available from around 1956 when the road was extended to plaintiffs' property until 1980 when access was limited by the erection of the gate.

Principles applicable to this case are illuminated by several cases. In *Park County, Montana v. U.S.*, 626 F.2d 718 (9th Cir. 1980), plaintiffs, counties of the State of Montana, filed suit in 1976 against the United States under § 2409a(a) to quiet title to an easement across lands of a national forest. The district court dismissed pursuant to the statute of limitations, then § 2409a(f).

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5. Plaintiffs do not attempt to establish a common law easement based upon prior permissive usage or upon long-time adverse usage. They assert a statutory easement which, by the terms of the Florida statute, is based upon necessity of access. It is undisputed that necessity of access exists. The history of prior usage, and the date that the government acted adversely to plaintiffs to terminate prior usage, are relevant not as the predicate for existence of an easement but to determine for statute of limitations purposes the scope of the government's interest and the time at which the plaintiffs knew or should have known of the government's claim that it could bar or limit the access previously permitted.

Appendix B

The forest area in which the claimed right of way existed had been the property of the United States since 1902. The major portion of the right of way claimed by the counties lay on a route that followed Forest Service trails that had been maintained since the early part of the twentieth century. Part of the alleged right of way lay in a portion of the national forest that in 1932 was designated as a Primitive Area. In 1962 the Forest Service placed a rock barrier and sign where the existent trail entered the Primitive Area, prohibiting entry by motor vehicles, a use not previously forbidden. The court of appeals agreed with the district court that plaintiffs knew or should have known of the claim of the United States to the purported right of way more than 12 years before the suit was brought. But the court did not measure the beginning of the limitations period from 1902, when the government became owner of the property, or from the time that the Forest Service began maintaining trails in the early part of the twentieth century, or from 1932 when the relevant part of the property was established as a Primitive Area, but rather from 1962, when the rock barrier and the sign were placed, prohibiting the use by motor vehicles.

In *Narramore v. U.S.*, 852 F.2d 485 (9th Cir. 1988), Congress had authorized the construction of a dam and reservoir substantially in accordance with recommendations submitted to Congress by the chief of the Corps of Engineers. Those recommendations included a schedule for the extent and duration of release of flood waters from the reservoir, known as Plan A. The Corps of Engineers, which operated the dam, never followed Plan A. Landowners sued in 1980 under § 2904a(a) to compel compliance with Plan A. The district court held the quiet title claim barred by the 12-year statute of § 2409a(g). The Corps of Engineers had failed to release water in accordance with Plan A as early as January 1966. Some landowners had sued in June 1966 to compel compliance with Plan A, but the suit had been

dismissed on sovereign immunity grounds. In the second case the Corps tendered evidence that it had released waters more rapidly after the 1966 suit was filed. Its public position, however, until 1977 was that Plan A was still in effect.

The limitations issue turned on whether plaintiffs either knew or should have known before November 1968 (12 years before the 1980 filing) that the government, as owner and operator of the dam and reservoir, claimed that it was not bound to comply with Plan A. The court of appeals held that there was a factual issue of whether the landowners had actual notice arising out of the 1966 failure to comply, because the flooding was of short duration and was followed by what could be perceived as government rectification of a mistake. *Id.* at 492. And it held there was no constructive notice of a policy of noncompliance, — because the public policy of the Corps until 1978 was that Plan A was in effect. *Id.* Therefore, the court erred in granting summary judgment on the limitations issue. Thus, in *Narramore* as here, the plaintiff showed rights or benefits previously enjoyed, in that case pursuant to a formalized plan, in this case pursuant to permissive usage, which the government asserted that it could remove or limit. In *Narramore* the date that triggered the beginning of the 12-year limitations period was not the date on which the landowners acquired knowledge that the government was owner and operator of the dam and reservoir but the date on which knowledge was acquired that the government was seeking to impose limitations or restrictions on the Plan A benefits that the landowners enjoyed from the government with respect to the property.

In *Kinscherff v. U.S.*, 586 F.2d 159 (10th Cir. 1978), the United States had built on its land a road to a dam site. Plaintiffs sued pursuant to § 2409a(a), alleging that they wished to develop their adjoining land to which the road was the sole access and that

the United States would not permit them to use the road to bring in equipment, machinery, or material. The district court dismissed for failure to state a cause of action. The Tenth Circuit reversed on the ground that whether an easement of necessity existed was a mixed question of law and fact. With respect to the statute of limitations the court held:

> [T]he limitation issue is a mixed question of fact and law as to whether the patentee or a successor in interest knew or should have known of the Government's *claim of no easement or of a limited easement.* Again we express no opinion as to such limitation period, and the facts pertinent to the commencement of the limitation period must be developed. (Emphasis added.)

Id. at 161. In Kinscherff, as in the present case, the triggering event for statute of limitations purposes was not the time at which the claimants knew that the government was owner but the time at which they knew or should have known that the government claimed that it could deny use by the plaintiffs of the access road to their property because there was no easement (or only a limited easement) permitting such use.

Elk Mountain Safari, Inc. v. U.S., 645 F.Supp. 151 (D.Wyoming 1986), follows the same principles. A landowner granted a right of way to the government in 1957. A subsequent owner sued the government, asserting that the easement was limited to government use to administer public lands pursuant to federal statutes, while the government claimed that the easement encompassed public use. The government raised the 12-year statute of limitations issue of § 2409a(f). The court held:

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> [T]he United States' claim to a public roadway was first openly contended in 1983 or 1984 and [that] plaintiffs' quiet-title action was filed within the requisite twelve-year statute of limitations period. 28 U.S.C. § 2409a; see also *Vincent Murphy Chevrolet Co. v. U.S.*, 766 F.2d 449 (10th Cir. 1985). A claim under § 2409a "accrues when the plaintiff has a reasonable awareness that the government claims some interest adverse to the plaintiff's." *Id.* at 452. *The adverse interest claimed by the United States is its position that the roadway should be open to the general public*; this was not expressed until 1983 or 1984 and the limitations period did not begin to run until that time. (Emphasis added.)

Id. at 15 155-56. An internal manual of the Bureau of Land Management of the Department of Interior, which had acquired the easement, stated the opinion that the roadway provided public access, but this was not sufficient to provide the plaintiff with reasonable awareness of the government's claim.

These cases may be compared with *Vincent Murphy Chevrolet Co., Inc. v. U.S.*, 766 F.2d 449 (10th Cir. 1985). The landowner acquired land by purchase from the United States. The deed contained sweeping restrictions, prohibitions and reserved rights in the government, presumably imposed because of nearby military activity. More than 12 years later the owner sued under § 2409a(a) to remove the limitations in the deed but was time-barred by the 12-year statue. The owner had notice of the restrictions from the deed itself. The district court and the court of appeals rejected the owner's theory that the purposes of the

restrictions had disappeared because military activity had ceased and the character of surrounding land had changed and that the statute of limitations only began to run when the government, within the 12 years, insisted that the restrictions were still valid. There was not, as in the case before us, any holding out or permission by the government that its claim was anything less than its rights set out in the deed, followed by a cessation of such holding out or permission that would adversely affect one previously enjoying the benefits thereof.

In their brief to this court plaintiffs have discussed *Elk Mountain, Kinscherff,* and *Narramore* and have predicated their appeal on the principles taught by those cases. The government has not responded to those cases (or to *Park County, Montana,* which it cites for another proposition) but rather, in inappropriate language, has described plaintiffs' argument as "border[ing] on a sanctionable abuse of the court for its speciousness," as "irrelevant," and "more disingenuous than simply mistaken." The primary position of the government is that the notice that triggers the statute of limitations need be only that the government claims some interest — any interest — in the property. We reject this theory. For statute of limitations purposes, the first inquiry must define the government's claim and then one must look to the time that the government, acting adversely to the interests of others, seeks to expand that claim. The district court erred in deciding the limitations issue by summary judgment.

The motion by the government to strike plaintiffs' reply brief and award sanctions is DENIED. The summary judgment is REVERSED and the case REMANDED for further proceedings.

APPENDIX C—ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION DATED DECEMBER 16, 1994

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 91-30072-RV

THOMAS F. WERNER, RUTH E. WERNER, DAVID LITWACK, YVETTE A. LITWACK, WILLIAM WARGO, and LYNN WARGO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Pending is the motion of the plaintiffs for summary judgment. (doc. 32). Also pending is the cross-motion of defendant United States of America to dismiss the complaint, or in the alternative, for summary judgment. (doc. 27).

I. BACKGROUND

Except as noted, the following facts are undisputed in the record. The plaintiffs are owners of a parcel of land located on Choctawhatchee Bay in Okaloosa County, Florida. The property

is bounded on three sides by water, and on the fourth side by the Eglin Air Force base. It is impossible to access the plaintiffs' property by land without crossing the adjoining Eglin property.

On March 15, 1991, the plaintiffs sued the United States pursuant to the Quiet Title Act [28 U.S.C. §2409a(a)], seeking a declaration that they had acquired an easement of necessity pursuant to Section 704.01(2), Florida Statutes.[1] The portion of Eglin across which the plaintiffs seek an easement is known as White Point. White Point Road, the public roadway nearest the plaintiffs' property, runs in a general north-south direction within Eglin and ends at Choctawhatchee Bay. White Point Road is approximately one and one-half miles from the western border of the plaintiffs' property.

The portion of Eglin lying between White Point Road and

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1. The statute states in pertinent part:

> **(2) Statutory way of necessity exclusive of common-law right. — Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service. . . .**

plaintiffs' western border is now a recreation area. Prior to its designation as a recreation area in 1956, the site was the location of Eglin housing and contained an access road linking the housing complex to White Point Road. Shortly after the Air Force removed the housing, it extended this road approximately three-tenths of a mile to the western border of the plaintiffs' property, so as to better serve the recreation area and a nearby Navy observation site.

In 1980, the Air Force placed an electric gate on the road which required a access card to unlock the gate. Because plaintiffs Thomas F. Werner, David Litwack, and William Wargo were civilian employees of Eglin, and were allowed to use the recreation area, each was issued an access card. Later, the procedure was changed, and the gate was unlocked from 7:00 a.m. until 10:00 p.m. The gate is now locked at 10:00 p.m. and the plaintiffs currently have no ingress or egress to their property during the night hours.[2] I previously granted summary judgment to the defendant on the basis of the applicable statute of limitations, but the Eleventh Circuit reversed. The plaintiffs have now moved for summary judgment, and the defendant has also filed a cross motion to dismiss the complaint, or in the alternative, for summary judgment, on the scope of the Quiet Title Act.

II. ANALYSIS

A. *Summary Judgment Standard.*

The standard for considering summary judgment motions is

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2. The factual background of this case is set forth in detail in my order of August 12, 1992, (doc. 13), as well as in the Eleventh Circuit's opinion in this case. *Werner v. United States*, 9 F.3d 1514 (11th Cir. 1993).

set out in my prior order of August 12, 1992, and is incorporated herein.

B. *Easements by Necessity.*

The cross motions for summary judgment raise two issues: (1) whether the Quiet Title Act authorizes easement by necessity suits against the United States; and (2) if so, whether the plaintiffs are entitled to an easement by necessity.

(1) Quiet Title Act. It is axiomatic that as sovereign, the government cannot be sued except as it consents to be sued. *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607, 613 (1980). Congress partially abrogated the United States' sovereign immunity in the Quiet Title Act when it authorized private parties to bring certain types of suits involving the title to real property against the United States. It is not clear whether easements by necessity were included within the scope of the Quiet Title Act.[3]

The plaintiffs and the defendant each cite the Supreme Court of the United States' opinion in *Leo Sheep Co. v. United States,* 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979) as authority. There, the Union Pacific Act of 1862 established a route for a transcontinental railroad, and divided the land surrounding the route into "checkerboard" sections. The Act, as later amended, granted the Union Pacific Railroad all odd numbered sections

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3. Part of the ambiguity arises from the word "quiet title." At the common law, an action to quiet title, or bill *quia timet,* could not be used to resolve title to an easement by necessity. The courts and commentators have disagreed on whether quiet title should be given its technical, common-law meaning, or instead, should be read generically to mean resolving title disputes.

within 20 miles of its tracks; the United States retained the even number sections. The Leo Sheep Company and the Palm Livestock Company were Union Pacific's successors in fee to certain odd numbered sections in Carbon County, Wyoming. These sections were east and south of the Seminoe Reservoir, an area composed in part of the even numbered sections, and used by the public for hunting and fishing. Because of the checkerboard configuration, it was impossible to enter the Seminoe Reservoir from that direction without crossing private land.

The United States constructed an access road to the Seminoe Reservoir across the livestock companies' land, asserting that the government had an easement by necessity. "Where a private landowner conveys to another individual a portion of lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These right-of-ways are referred to as 'easements by necessity.' " 440 U.S. at 679, 99 S.Ct. at 1409, 59 L.Ed.2d at 686. The two private landowners filed suit pursuant to the Quiet Title Act seeking to quiet title against the United States. *Leo Sheep* involved the United States attempting to obtain an easement by necessity against a private party. The Supreme Court held, *inter alia,* that the easement by necessity doctrine was not available to the sovereign because of its ability to acquire the land by eminent domain. The court did not consider the reverse situation, i.e., whether the Quiet Title Act authorized an easement by necessity action against the United States. Nor did it discuss the scope of the Act at all, and the case really provides no guidance for this action.

In support of their contention that an easement by necessity may be asserted against the United States, the plaintiffs cite

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Montana Wilderness Asstn. v. United States, 496 F.Supp. 880 (D.Mont. 1980), *aff'd on other grounds,* 655 F.2d 951 (9th Cir. 1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982). There, Burlington Northern Railroad owned land which was intermingled with the Gallatin National Forest in the same checkerboard pattern that was involved in *Leo Sheep.*[4] After the railroad was granted a permit to construct a logging road across the government owned forest land, an environmental activist group filed suit to block construction of the road, and the permit was temporarily withdrawn.

Burlington Northern asserted, *inter alia,* that it had an easement by necessity to construct the road. The Secretary of Agriculture requested a formal opinion from the Attorney General. In a lengthy opinion, Attorney General Civiletti concluded that "the common law doctrine of easement by necessity does not apply to land owned by the federal government." 43 Op. Att'y Gen. No. 26 (June 23, 1980). While conceding that the opinions of the Attorney General are entitled to "great weight," the district court concluded that an easement by necessity could exist against the United States. 496 F.Supp. at 884-85. The court then announced two requirements to assert an easement by necessity against the United States. First, the party claiming an easement must satisfy the three common law prerequisites. *Id.* at 885. However, satisfaction of the common law requirements "is not enough." *Id.* The claimant must demonstrate that Congress "intended, or at least expected, that grantees of its land would enjoy a right of access by way of necessity." *Id.* Finding that the prerequisites were met, and that

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4. An 1864 Act of Congress had granted the land to Burlington Northern's predecessor, Northern Pacific Railroad Company. The Act was essentially identical to the one involved in *Leo Sheep.*

Congress intended that the grantees enjoy a right of access when they passed the Northern Pacific land grants, the court held that Burlington Northern held an easement by necessity. The appellate court did not address this issue.

There is no reported appellate case law on this subject. At least one other district court has agreed with *Montana Wilderness. See Burdess v. United States,* 553 F.Supp. 646, 648 (E.D. Ark. 1982). Plainly, there is a sound rationale for concluding that the common law doctrine of easement by necessity does not apply to land owned by the United States. But for purposes of ruling on these motions, I will assume, without deciding, that in the appropriate circumstances an easement by necessity may be asserted against the United States pursuant to the Quiet Title Act.

(2) **The Governing Law.** The plaintiffs, conceding that they do not met the federal common law requirements for an easement of necessity, have brought their claim pursuant to Section 704.01(2), Florida Statutes (1991). The most significant difference between federal law and Florida law is that Florida does not require unity of title. The government contends that, assuming an easement by necessity may be asserted against the United States, it is federal law, and not state law, that governs.

Waivers of sovereign immunity are to be strictly construed. *See e.g., Block v. North Dakota,* 461 U.S. 273, 287, 103 S.Ct. 1811, 1820, 75 L.Ed.2d 840, 853 (1983). The United States may only be sued to the extent, and in the manner, Congress evinced an intention to allow the government to be sued. There is strong evidence in the legislative history of the Quiet Title Act that Congress intended federal law to govern, at least with respect to the standing of the plaintiff:

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> One approach to waiving sovereign immunity in this area would have been to adopt state law in its entirety, thereby placing the United States on the same footing as any private litigant. However, the wide differences in State statutory and decisional law on this subject make this an impractical alternative. . . . It is our belief that uniformity at least as to the plaintiff's qualifications for instituting suit is desirable.

H. R. Rep. No. 92-1559, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4555.

The plaintiffs maintain that a state retains jurisdiction over federal lands within its territory. That is true in a general sense. In the absence of a contravening federal statute or policy, suits by the United States to protect its proprietary interests in land are governed by the law of the state in which the property is situated. *United States v. Sullivan,* 1 F.3d 1191, 1195 (11th Cir. 1993). However, this case involves not a suit by the government, but a suit against the government. The rights of a party suing the United States are determined by Congress when it consented to be sued. As noted above, it appears that the intention of Congress in enacting the Quiet Title Act was for federal law to govern so as to achieve uniformity in ascertaining plaintiffs able to bring suit under the Act.

Every case I have discovered in which a private litigant was allowed to assert an easement of necessity against the United States has applied federal common law. The plaintiffs have not cited, nor have I found, any reported case which even considered the possibility that a private individual could assert an easement

of necessity against the United States pursuant to a state statute. Accordingly, I find that the federal common law of easements by necessity governs this dispute.

There are three prerequisites to the creation of a common law easement by necessity. First, the titles to the two tracts in question must have been held by one person. Second, the unity of title must have been severed by a conveyance of one of the tracts. Third, the easement must be necessary in order for the owner of the dominant tenement to use his land. This necessity must exist both at the time of the severance of title and at the time of exercise of the easement. *See e.g., Montana Wilderness, supra,* 496 F.Supp. at 885. It is undisputed in the record that there was never unity of title in this case. The plaintiffs concede they do not meet the federal requirements, and have based their claim solely on the Florida statute. Accordingly, I find that the plaintiffs are not entitled to an easement of necessity under the governing law.[5]

(3) The Intent of Congress. I also consider briefly the intent of Congress in passing the Quiet Title Act. As discussed above, waivers of sovereign immunity are strictly construed, and should be interpreted only to allow the United States to be sued in the manner Congress intended. Unlike the property in *Montana Wilderness,* for example, which was a national forest and in the public domain, the property in which the plaintiffs seek to obtain

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5. Even if I were to adopt the reasoning of *Montana Wilderness* in toto, and if I applied the Florida statute, the plaintiffs still would not be entitled to an easement of necessity. *Montana Wilderness* required that claimants demonstrate that they meet the legal requirements for an easement, and that Congress expected that the grantees would have a right of access. There is absolutely no evidence that Congress expected the fee owners of the plaintiffs' property to have a right of access across the adjoining military reservation.

an easement is part of a military reservation, closed to the general public, and to which access is strictly regulated.

Congress has vested the authority to grant right-of-ways over military reservations to the Secretary of the military department which controls the land. 10 U.S.C. §2668. I have discovered no statute or case extending that authority to any other person. The federal government has "unfettered control" in managing a military reservation. *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 1237 (1961). The plaintiffs have cited no authority for their contention that when it passed the Quiet Title Act, it intended to allow states to enact laws granting absolute access to federal military bases for any reason (or no reason) as it saw fit, and to have those statutes enforced by a quiet title action against the United States. To the extent the Florida statute violates federal law and grants civilians unfettered access across military reservations, it appears likely to be nullified by the Supremacy Clause of the United States Constitution.

III. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED. The Clerk shall enter judgment for the defendant, together with taxable costs.

DONE AND ORDERED this 16 day of December, 1994.

s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX D — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION FILED AUGUST 12, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 91-30072-RV

THOMAS F. WERNER, RUTH E. WERNER, DAVID LITWACK, YVETTE A. LITWACK, WILLIAM WARGE, LYNN WARGO,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

Pursuant to and at the direction of the Courts judgment is entered for the defendant, UNITED STATES OF AMERICA, together with taxable costs.

MARVIN S. WAITS, CLERK

By: s/ Joanne Ahr
Deputy Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 91-30072-RV

THOMAS F. WERNER, RUTH E. WERNER, DAVID LITWACK, YVETTE A. LITWACK, WILLIAM WARGO, LYNN WARGO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Pending is defendant United States of America's motion for summary judgment (doc. 6). For the reasons stated below, that motion is GRANTED.

I. FACTS

A. *The Property*

The plaintiffs own a three-lot subdivision known as "White Point Manor." Altogether, the three lots comprise about 1.3 acres surrounded on three sides by water and on the fourth side by Eglin Air Force Base ("Eglin AFB"). Plaintiffs have brought this action pursuant to Title 28, United States Code, Section 2409a,

commonly known as the Quiet Title Act, in an attempt to acquire a statutory easement of necessity across a portion of Eglin Air Force Base. Except where noted, the following facts are not in dispute.

Plaintiffs' property is a small triangular parcel of land located on the Choctawhatchee Bay in Okaloosa County, Florida. The property is bordered on the north by a body of water called "Lake Pippin," on the south by Choctawhatchee Bay, on the east by the Lake Pippin entrance canal, and on the west by Eglin AFB. It is physically impossible to enter plaintiffs' property by land without crossing over Eglin AFB. Therefore, it has no access by land for ingress and egress, nor for electricity and other utilities. Plaintiffs' property is, of course, accessible by water.

The portion of Eglin AFB across which the plaintiffs seek an easement is known as White Point. White Point Road, the public roadway nearest plaintiffs' property, runs in a generally north-south direction within Eglin AFB, and ends at White Point on the Choctawhatchee Bay. It is about one and one-half miles from the western border of plaintiffs' property to White Point Road. The portion of Eglin AFB lying between White Point Road and plaintiffs' western border comprises the Maxwell Gunter Recreation Area.

Prior to its designation as a recreation area in 1956, the site was the location of Eglin AFB housing, and contained an access road linking the housing complex to White Point Road. Shortly after the Air Force removed the housing, it extended this road approximately three tenths of a mile in order to better serve the recreation area and a nearby Navy observation site. The access road (Range Road 445) now terminates at the western border of plaintiffs' property.

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Since approximately 1980, travel over the access road from White Point Road to the recreation area has been controlled by an electronic gate. Originally, defendant issued visitors a gate card that activated the gate. However, under current practice, the gate remains open from 7:00 a.m. until 10:00 p.m. During this time, access to the recreation area, and, hence, to plaintiffs' property, is open to those individuals authorized to use the recreation area. As civilian employees of Eglin AFB, plaintiffs' are so authorized.

Plaintiffs suggest that land access to their property originally was available across a land bridge of privately owned land to the east of their lots which the Air Force dredged in order to create the Lake Pippin entrance canal. However, plaintiffs have submitted absolutely no evidence that would support this assertion. The evidence, in fact, overwhelmingly indicates the contrary.

It is true that between 1959 and 1978, the United States regularly dredged the entrance channel into Lake Pippin. In addition, in 1969 and 1970, it erected a metal seawall in the pass, and, at the same time, constructed a dock and a concrete boat ramp on the Lake Pippin side of the recreation area. However, the undisputed evidence in the record shows that an inlet always has existed between Choctawhatchee Bay and Lake Pippin.[1]

The record contains several aerial photographs of the subject property dating from as early as April 14, 1955. Each photograph clearly and unmistakably shows an inlet from Chocotawhatchee Bay to Lake Pippin. In addition, a survey map completed in 1851,

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1. Prior to the commencement of regular dredging and the installation of the seawall, the channel depth would vary depending on the season and the tide, but the pass has never been accessible to vehicular traffic. It has always been below the mean high water level, which is the test.

which shows Lake Pippin as "Trout Bayou", clearly indicates the existence of an entrance pass between the Choctawhatchee Bay and Trout Bayou.[2] Finally, defendant has submitted the affidavits of two long time local residents, both of whom were also civilian employees at Eglin AFB. The recollection of both affiants dates back to the 1930s. Both state that, having lived and worked in the area for many years, they are familiar with Lake Pippin and the surrounding area, and that during their lifetimes, Lake Pippin has been a tidal basin and there always has been an inlet from the Bay to Lake Pippin.[3]

B. *The Chain of Title*

Plaintiffs trace title to their parcel from a warranty deed dated May 22, 1992, transferring their parcel, along with a large tract of property, from McCaskill Investment Company to Valparaiso Realty Company.[4] Only private owners appear in plaintiffs' chain of title. In addition, there is no record of an

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2. The record also contains a copy of another survey completed in 1937. This map does not show a channel linking Lake Pippin and the Bay. However, standing alone, this single piece of evidence does not create a *genuine* issue of material fact as to the existence of the inlet.

3. Even if plaintiffs' assertion is true, and there was at one time a land bridge linking their property to that of their eastern neighbors, it is undisputed that the Lake Pippin entrance canal has not been accessible to vehicular traffic since at least the commencement of regular dredging in 1959. This is well before the statute of limitations cut-off date of March 15, 1979.

4. The property is located in Okaloosa County. However, until Okaloosa County was formed n 1916, it was a part of Walton County. Since the Walton County Courthouse burned in the 1880s, most of the real estate deed records predating the fire are unavailable.

access easement across government property and appurtenant to plaintiffs' property. Nor have plaintiffs submitted any evidence that would suggest that such an easement ever existed. However, there is an utility easement (10' wide) from the State of Florida to the plaintiffs for a private water line across the submerged bottom of Lake Pippin.

Before purchasing the property in 1987, the Werners approached the defendant and asked if it would be willing to provide access across White Point to plaintiffs' property. In both April and June of 1987, the defendant informed the Werners that it would not grant access. Nevertheless, with knowledge that the parcel had no land access, the Werners purchased the property from Europco Management Company of America on July 28, 1987. The Werners then subdivided the property into three lots. They transferred one lot to plaintiffs David and Yvette A. Litwack, and one lot to plaintiffs William and Lynn Wargo. In September 1987, the Werners and the Litwacks filed a subdivision plat to "White Point Manor," which indicates that there was an existing easement (20' wide) from the plaintiffs' subdivision across Eglin AFB to White Point Road. In actuality, it merely reflects the presence of the access road serving the Maxwell Gunter Recreation Area.

The United States government has owned the property in question since 1821, when it acquired it, along with what is now Florida, Southern Alabama, and portions of Southern Mississippi by treaty from Spain.[5] In more recent times, the subject property

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5. The Treaty of Cession of the Floridas by Spain to the United States, ratified February 19, 1821, contains the following:

Article II. His Catholic Majesty cedes to the United

(Cont'd)

was part of the Choctawhatchee National Forest, under the care and control of the Forest Service, Department of Agriculture. In 1940, pursuant to an act of Congress, the Department of Agriculture transferred the property in question to the War Department. Act of June 27, 1940, ch. 437, Pub. L. No. 40-668, 54 Stat. 628. Designated in the Act as "Tract B. Eglin Air Force Base," the entire tract consisted of 133,848.07 acres of land. It has been a part of Eglin AFB since 1940.

C. *The Parties' Present Positions*

In June 1988, in response to a request for reconsideration, the defendant offered the Werners a five year "easement in gross." The Werners declined this offer, and on February 2, 1990, the Werners and the Litwacks filed their first complaint in this court, seeking to quiet title to an easement of necessity across White Point. After filing the complaint, the plaintiffs and defendant entered into settlement negotiations. On April 6, 1990, the court granted the plaintiffs' motion for voluntary dismissal, without prejudice. In December 1990, the defendant offered a 25 year

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(Cont'd)

> States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant land public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissaries or officers of the United States, duly authorized to receive them.

easement appurtenant to the plaintiffs' property limited to a single family residence. Upon rejecting this offer, the plaintiffs filed the presently pending complaint.

Plaintiffs argue that Florida's statutory easement of necessity, Section 704.01(2), Florida Statutes (1991), provides them with a substantive right to a way of necessity across defendant's property, and that, in turn, the Quiet Title Act [28 U.S.C. § 2409a] waives sovereign immunity to their claims to quiet title to this easement.[6] In response, defendant raises a number of issues, including the argument that plaintiffs' claims

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6. Section 704.01(2) as amended, effective May 29, 1991, provides: "**Statutory way of necessity exclusive of common-law right.** — Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles . . . and any utility service . . . over, under, through, and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which the lands are being put. . . ."

Section 704.04 gives an affected party the right to file suit in Circuit Court to determine whether the statutory way of necessity exists and the amount of compensation to which the owner of the land is entitled, if an easement is found to exist.

Under Florida law, the fact that plaintiffs' property is accessible by water does not affect their right to a statutory way of necessity across defendant's property under Section 704.01(2). *Lykes Bros., Inc. v. Clements*, 501 So.2d 1302, 1304 (Fla. 2d DCA 1986); *Redman v. Kidwell*, 180 So.2d 682, 683-84 (Fla. 2d DCA 1965).

are barred by the 12-year statute of limitations set out in Section 2409a(g). Because it is clear that plaintiffs' (or their predecessors in interest) claims accrued more than twelve years ago, I need not reach defendant's other arguments.

II. ANALYSIS

A. *Summary Judgment Standard*

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986); *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

"The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake,* 880 F.2d 348, 351 (lath Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.*

Appendix D

On summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176, 177 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987).

B. *Statute of Limitations*

Defendant argues that plaintiffs' claims are barred by the Quiet Title Act's twelve year statute of limitations. I agree.

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued. . . .' " *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351, 63 L. Ed. 2d 607, 613 (1980) (citation omitted). The Quiet Title Act provides a specific waiver of immunity to actions to quiet title to real property. In relevant part, the Act provides:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. . . .
>
> 28 U.S.C. § 2409a(a).

However, this waiver of immunity is specifically limited by a twelve year statute of limitation which provides:

> (g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. *Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.*
>
> 28 U.S.C. § 2409a(g) (emphasis added).

Courts must strictly construe such limitations on waivers of sovereign immunity. *Block v. North Dakota,* 461 U.S. 273, 287, 103 S. Ct. 1811, 1820, 75 L. Ed. 2d 840, 853 (1983); *Hart v. United States,* 585 F.2d 1280, 1284 (5th Cir. 1978). Therefore, to the extent that Florida law gives the plaintiffs a statutory remedy under Section 704.01(2), Florida Statutes, that remedy can be invoked against the sovereign (i.e., the United States) only to the extent allowed by federal law as expressed in Section 2409a.

Plaintiffs filed the instant complaint on March 15, 1991. Therefore, their claims are barred if they accrued prior to March 15, 1979.[7] Assuming for the sake of this analysis that the Quiet Title Act does waive sovereign immunity to claims for quieting title to easements of necessity, it is clear that plaintiffs and their predecessors in interest either knew or should have known of the

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7. Even if I were to figure the limitations period from February 2, 1990, the date plaintiffs filed their first complaint, the conclusion still would be inescapable that plaintiffs claim is barred by the twelve year statute of limitations. As discussed below, it is clear that plaintiffs had constructive notice of the defendant's interest in White Point prior to February 2, 1978.

defendant's ownership of the subject property and the lack of land access to plaintiffs' property prior to that date.[8]

For purposes of determining when the plaintiffs' claim accrued, the statutory term "knew or should have known" imparts a test of reasonableness. *Shultz v. Department of the Army,* 886 f.2d 1157, 1160 (D.C. Cir. 1989); *Vincent Murphy Chevrolet Co., Inc. v. United States,* 766 F.2d 449, 452 (both Cir. 1985); *Knapp, supra,* 636 F.2d at 283; *Amoco Production Co. v. United States,* 619 F.2d 1383, 1388 (10th Cir. 1980). Knowledge of the full contours of the government's interest or ownership is not required. *Knapp v. United States,* 636 F.2d 279, 283 (10th Cir. 1980). All that is necessary is a reasonable awareness that the government claims some interest or ownership in the subject property. *Id.*

Unquestionably, the government's ownership of Eglin AFB was fully known to all interested parties. It has been a part of Eglin AFB since 1940, and was government owned ever since the land was part of the United States. Even without actual knowledge of the defendant's interest prior to March 15, 1979,

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8. Defendant argues strenuously that a statutory easement of necessity cannot be the subject of a quiet title action against it. There is merit in that position, for the statutory easement of necessity is a form of state condemnation which, absent specific federal authorization, is of questionable validity against the United States. While I need not resolve this issue to reach a decision in this case, I note that the legislative history of the Quiet Title Act, as well as the case law interpreting it, support the conclusion that Section 2409a waives sovereign immunity to claims to quiet title to easements in general. H. R. rep No. 921559, 92d cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4552. *See also Kinscherff v. United States,* 586 F.2d 159, 161 (10th Cir. 1978). *Montana Wilderness Ass'n v. United States,* 496 F. Supp. 880, 884-86 (D. Mont. 1980), *aff'd in part, remanded on other grounds,* 665 F. 2d 951 (9th Cir. 1981).

constructive notice of the government's interest will suffice to trigger the "accrual of a claim" for purposes of Section 2409a(g). *D.C. Transit System. Inc. v. United States,* 717 F.2d 1438, 1441 (D.C. Cir. 1983); *Amoco, supra,* 619 F.2d at 1388. In particular, federal courts properly may look to state law as an aid in determining when a party should have known a relevant fact. *Amoco Production Co., supra,* 619 F.2d at 1387-88. Thus, a party "should have known" of a claim of the United States at the time local recording statutes clearly impute constructive knowledge of the claim. *Id.; D.C. Transit System, supra,* 717 F.2d at 1441. The same basis of knowledge applies to the plaintiffs' property.

Under Florida's recording statute [§ 695.01, Fla. Stat.,]:

> the recordation of an instrument is constructive notice to creditors and subsequent purchasers not only of its own existence and contents, but also of such other facts concerned with the instrument as would have been ascertained from the record if it had been examined and [of such facts as] inquiries suggested by it, duly prosecuted, would have disclosed, *and if, in investigation of a title a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed as a matter of implied actual notice.*

Zaucha v. Town of Medley, 66 So.2d 238, 240 (Fla. 1953) (emphasis added).

In this case, the fact that plaintiffs' property is accessible by land only across Eglin AFB from the west is apparent on the face

of their deeds and the referenced Sections. Equally apparent is the absence of any type of access easement in their chains of title. Clearly these facts not only put plaintiffs and their predecessors in interest on notice that there was no access to their property across Eglin AFB, but also suggested the need for further inquiry. Had plaintiffs or their predecessors heeded this suggestion, a simple investigation would have revealed that the government has owned all the adjoining land on the west since 1821. Under Florida law, plaintiffs and their predecessors in interest are charged with the knowledge of this interest.[9]

However, constructive notice under the applicable state recording statute is but one condition that will satisfy the requirements of Section 2409a(g). Because the statute sets out a test of reasonableness, its reach is broader than that of local recording statutes. *D.C. Transit System, supra,* 717 F.2d at 1441. Therefore, "where a party should have reasonably discovered an adverse property interest asserted by the United States, he will be charged with constructive notice of the government claim even though a local statute does not impute such knowledge to him." *Id.*

In this case, the defendant has continuously and openly occupied Eglin AFB since at least 1940. Since that time, defendant has constructed a military housing complex and the access road now at issue. By 1956, the defendant had removed the housing complex and converted White Point into a recreation area. Subsequently, the defendant extended its access road, and

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9. At the federal level, both the Treaty of Cession and the Act of June 27, 1940, transferring the Eglin tract to the War Department were matters of public record and, hence, provided constructive notice of defendant's interest long before March 15, 1979. *Great Northern Ry. v. Steinke,* 261 U.S. 119, 132 (1923). *See also Yakus v. United States,* 321 U.S. 414, 435 (1944).

built an observation site, a bath house, a boat ramp, and a dock on the property. From 1959 to 1978, it regularly dredged the Lake Pippin entrance canal, and in 1969 and 1970, defendant built a seawall adjacent to the entrance canal. There can be no question that this evidence of continuous occupation and varied use would have put any reasonable person on notice of defendant's interest in the White Point area of Eglin AFB prior to March 15, 1979.[10]

It follows that the plaintiffs (and their predecessors in title) have also known for at least that long that the only land access to their parcel is across the defendant's land. Thus, regardless of whether the standard of "knew or should have known" applies to plaintiffs' own knowledge of the need for a way of necessity or to the plaintiffs' knowledge of the government's ownership of the property across which it would have to go, plaintiffs' action is barred by the Quiet Title Act's twelve year statute of limitations. Accordingly, defendant's motion is GRANTED, and judgment shall be entered for the defendant, together with taxable costs.

DONE AND ORDERED this 12th day of August, 1992.

s/ Roger Vinson
ROGER VINSON
United States District Judge

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10. it is true that defendants did not place a gate across the access road until 1980. However, this fact, by itself, is not dispositive of the issue of constructive notice. Rather, it is but one event that the court may consider in making its determination.

APPENDIX E — RELEVANT STATUTES

28 U.S.C. § 2409a.

28 U.S.C. § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

Appendix E

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement

grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be —

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

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(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

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28 U.S.C. § 1346

28 U.S.C. § 1346

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

Appendix E

Florida Statue 704.01

704.01 Common-law and statutory easements defined and determined. —

(1) IMPLIED GRANT OF WAY OF NECESSITY. — The common-law rule of in implied grant of a way of necessity is hereby recognized, specifically adopted, and clarified. Such an implied grant exists where a person has heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over his land, or has heretofore retained or hereafter retains land which is inaccessible except over the land which he conveys. In such instances a right-of-way is presumed to have been granted or reserved. Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States; provided, however, that where there is a common source of title subsequent to the original grant from the state or United States, the right of the dominant tenement shall not be terminated if title of either the dominant or servient tenement has been or should be transferred for nonpayment of taxes either by foreclosure, reversion, or otherwise.

(2) STATUTORY WAY OF NECESSITY EXCLUSIVE OF COMMON-LAW RIGHT. — Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be

shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, including , but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through, and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided that such easement shall be used only in an orderly and proper manner.